

1
2
3
4
5
6
7 PAZMANY BROTHERS LANDSCAPING
8 INC.,
9 Plaintiff,
10 v.
11 CITIGROUP, INC., et al.,
12 Defendants.

Case No. 20-cv-01526-SVK

**ORDER ON MOTION TO DISMISS
FIRST AMENDED COMPLAINT**

Re: Dkt. No. 9

13 This case involves claims by Plaintiff Pazmany Brothers Landscaping Inc. (“Plaintiff” or
14 “Pazmany”) against Defendants CITIGROUP, INC. and CITBANK, N.A. (collectively,
15 “Defendants” or “Citi”) relating to embezzlement by Pazmany’s former bookkeeper, Guadalupe
16 Lola Reed (“Reed”), who deposited checks written from Pazmany’s bank account to various
17 payees into Citi accounts owned or controlled by Reed. *See* Dkt. 1.¹ Citi now seeks to dismiss the
18 FAC pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Dkt. 9. The
19 parties have consented to the jurisdiction of a magistrate judge. Dkt. 5, 12.

20 Pursuant to Civil Local Rule 7-1(b), the Court deems the motion to dismiss suitable for
21 determination without oral argument. After considering the parties’ submissions, the case file, and
22 relevant law, and for the reasons discussed below, the motion to dismiss is **GRANTED IN PART**
WITHOUT LEAVE TO AMEND and DENIED IN PART.

23 **I. BACKGROUND**

24 This discussion of the background facts is based on the allegations of the FAC. Pazmany
25 operates a landscaping business in Santa Clara County California. FAC ¶ 8. From approximately
26 2014 to February 2017, Pazmany employed Reed as a bookkeeper. *Id.* ¶ 9. One of Reed’s job
27

28 ¹ The FAC is included in the Notice of Removal at PDF pages 11-23. Dkt. 1.

1 duties was to prepare checks for Pazmany, but she was not authorized to sign the checks she
2 prepared. *Id.* ¶ 10. Reed was also responsible for maintaining Pazmany's books and records and
3 managing payments to Pazmany's vendors. *Id.* ¶ 11.

4 During her employment, Reed wrote unauthorized checks on Pazmany's account made
5 payable to Reed, other Pazmany employees, Pazmany's suppliers, "Cash," and other payees.

6 *Id.* ¶ 13. Reed deposited those checks by ATM to a bank account she maintained at Citi.

7 *Id.* ¶¶ 13-15. Pazmany alleges on information and belief that Citi presented the checks to
8 Pazmany's bank, Bank of America, for payment; that Bank of America honored the checks,
9 debited Pazmany's account, and made payments to Citi from Pazmany's account; and that Citi
10 credited those amounts to accounts owned or controlled by Reed. *Id.* ¶¶ 16-17. During her
11 employment, Reed embezzled in excess of \$722,000 from Pazmany. *Id.* ¶ 12. The Santa Clara
12 County District Attorney prosecuted Reed, and she has been convicted of embezzlement. *Id.*

13 On March 2, 2020, Citi removed this civil case, which was originally filed in Santa Clara
14 County Superior Court, to this Court. Dkt. 1. Prior to removal, Pazmany filed the FAC in the
15 state court case. *Id.* at Notice of Removal ¶ 2. The FAC contains four causes of action:
16 (1) negligence/violation of UCC; (2) common law negligence; (3) money had and received; and
17 (4) unfair business practices. *Id.* After removal, Citi filed the present motion to dismiss the FAC,
18 which Pazmany opposes. Dkt. 9, 13.

19 **II. LEGAL STANDARD**

20 Under Rule 12(b)(6), a district court must dismiss a complaint if it fails to state a claim
21 upon which relief can be granted. In ruling on a motion to dismiss, the court may consider only
22 "the complaint, materials incorporated into the complaint by reference, and matters of which the
23 court may take judicial notice." *Metzler Inv. GmbH v. Corinthian Colls., Inc.*, 540 F.3d 1049,
24 1061 (9th Cir. 2008). In deciding whether the plaintiff has stated a claim, the court must assume
25 the plaintiff's allegations are true and draw all inferences in the plaintiff's favor. *Usher v. City of*
26 *L.A.*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true
27 "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
28 inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted).

1 To survive a motion to dismiss under Rule 12(b)(6), the plaintiff must allege “enough facts
2 to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
3 570 (2007). This “facial plausibility” standard requires the plaintiff to allege facts that add up to
4 “more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S.
5 662, 678 (2009).

6 Leave to amend must be granted unless it is absolutely clear that the complaint’s
7 deficiencies cannot be cured by amendment. *Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248 (9th Cir.
8 1995).

9 III. DISCUSSION

10 A. Negligence/Violation of UCC

11 Pazmany’s first cause of action is labeled “Negligence/Violation of UCC” and argues that
12 Citi owed various duties to Pazmany under the Uniform Commercial Code (“UCC”).
13 FAC ¶¶ 21-32. Citi argues that “Plaintiff does not specify the provision of the [UCC] allegedly
14 violated” and “Citi is unaware of any provision of the UCC that applies to a depository bank under
15 the facts alleged.” Dkt. 9 at 2. In response, Pazmany argues that Citi has violated transfer
16 warranties under UCC § 4-207 and presentment warranties under UCC § 4-208. Dkt. 13 at 5-7.
17 In its reply, Citi argues that the UCC warranties identified by Pazmany operate for the benefit of
18 Pazmany’s bank, Bank of America, not Pazmany itself, and thus Pazmany cannot base a cause of
19 action for negligence on these UCC warranties. Dkt. 15 at 1-3.

20 1. UCC § 4-207 Transfer Warranties

21 UCC § 4-207, as implemented in California Commercial Code § 4207, contains various
22 transfer warranties. Pazmany relies on the transfer warranty set forth in Section 4207(a)(1), which
23 provides: “A customer or collecting bank that transfers an item and receives a settlement or other
24 consideration warrants to the transferee and to any subsequent collecting bank that … The
25 warrantor is a person entitled to enforce the item.” See Dkt. 13 at 7. Pazmany argues that by
26 accepting funds, Citi “warranted it was entitled to receive the settlement money from Bank of
27 America” but “[i]n fact Citibank, was not entitled to receive the money because [its] right to do so
28 was based on Reed’s presentation of checks made out to others.” *Id.*

1 Under Section 4207, the “collecting bank” gives the warranty. Pazmany is correct that Citi
2 is the “collecting bank” in this case, and thus Citi gave a transfer warranty. Cal. Comm. C.
3 § 4105. Section 4207 “plainly describes the *transferee* as the recipient of the warranty.” *Mills v.*
4 *U.S. Bank*, 166 Cal. App. 4th 871, 882 (2008) (emphasis in original). The Court must therefore
5 determine whether Pazmany is the “transferee” of the checks at issue.

6 “A check typically involves three parties, (1) the ‘drawer’ who writes the check, (2) the
7 ‘payee,’ to whose order the check is made out, and (3) the ‘drawee’ or ‘payor bank,’ the bank
8 which has the drawer’s checking account from which the check is paid.” *Id.* at 881 n.10 (citing *In*
9 *re McMullen Oil Co.*, 251 B.R. 558, 566-567 (Bankr. C.D. Cal. 2000)).

10 Here, Pazmany, upon whose account the checks deposited by Reed were written, is the
11 “drawer.” *See Mills*, 166 Cal. App. 4th at 882 (stating that the “drawers” of the checks at issue
12 were the plaintiffs, who wrote the checks). *Mills* is instructive. The plaintiffs in *Mills* were
13 investors who wrote checks made payable to “Third Eye Systems, LLC.” *Id* at 876. The checks
14 were not negotiated by Third Eye Systems, LLC, but by a different entity, Third Eye Systems
15 Holdings, Inc., which presented the checks for deposit into its account at U.S. Bank. *Id.* U.S.
16 Bank accepted the checks for deposit. *Id.* The court in that case considered whether the plaintiff-
17 investors could sustain an action against U.S. Bank for breach of certain presentment and transfer
18 warranties under UCC §§ 4207 and 4208. *Id.* at 881. The court agreed with U.S. Bank that
19 “neither section 4207 nor 4208 describe warranties inuring to the benefit of the drawers of the
20 checks, who in this case would be Plaintiffs.” *Id.* at 883. Instead, the warranty in section 4207(a)
21 “runs to the transferee, and “[t]he *drawers* of the checks” … could not have been the *transferee*[]
22 of the checks.” *Id.* (emphasis in original).

23 Here, Pazmany, like the plaintiff-investors in *Mills*, was the drawer of the checks at issue.
24 As such, Pazmany was not the transferee of the checks and is thus not the recipient of the transfer
25 warranty under Section 4207.

26 **2. UCC § 4-208 Presentment Warranties**

27 “Section 4208 sets forth presentment warranties, which apply when a check is presented
28 for payment to the bank of the person who wrote the check.” *Mills*, 166 Cal. App. 4th at 882.

1 Pazmany relies on the presentment warranty in Section 4208(a)(1), which warrants that “[t]he
2 warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the
3 draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to
4 enforce the draft. Dkt. 13 at 6 (arguing that “Citibank violated the ‘right to negotiate’ warranty.”).

5 As with the transfer warranty upon which Pazmany relies, the presentment warranty
6 protects Bank of America, not Pazmany. The official comments to UCC 4-208 state:

7 Subsection (a)(1) in effect is a warranty that there are no unauthorized or missing
8 indorsements ... There is no warranty made to the drawer under subsection (a) when
9 presentment is made to the drawee. Warranty to the drawer is governed by subsection (d)
10 and that applies only when presentment for payment is made to the drawer with respect to
11 a dishonored draft. In *Sun 'N Sand, Inc. v. United California Bank*, 582 P.2d 920 (Cal.
12 1978), the court held that under former Section 3-417(1) a warranty was made to the
13 drawer of a check when the check was presented to the drawee for payment. The result in
14 that case is rejected.

15 Official Comment 2 to UCC § 3-417, cross-referenced in Official Comment 1 to UCC § 4-208.

16 As explained in *Mills*, where an accountholder at defendant U.S. Bank deposited checks
17 written by plaintiff-investors to others, “section 4208, as applied here, indicates that in presenting
18 the checks for payment to Plaintiffs’ banks, U.S. Bank was making certain warranties *to Plaintiffs’*
19 *banks*, but not to Plaintiffs themselves.” *Mills*, 166 Cal. App. 4th at 883 (emphasis in original).
20 Similarly, in this case the presentment warranty protects Pazmany’s bank (Bank of America), but
21 not Pazmany itself.

22 3. Conclusion on Cause of Action for Negligence/Violation of UCC

23 Citi has demonstrated that, as a matter of law, the UCC transfer and presentment
24 warranties upon which Pazmany premised its first cause of action do not extend to Pazmany.
25 Because any amendment of this cause of action would be futile, no leave to amend will be granted.
26 *Thinket Ink Info. Resources, Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004).
27 Accordingly, Citi’s motion to dismiss the first cause of action for negligence/violation of UCC is
28 **GRANTED WITHOUT LEAVE TO AMEND.**

29 B. Common Law Negligence

30 To plead a claim for negligence under California law, a plaintiff must plead the following

1 elements: (1) the existence of a legal duty of care, (2) a breach of that duty, and (3) proximate
2 cause resulting in injury. *Chang v. Wells Fargo Bank, N.A.*, No. 19-cv-01973-HSG, 2020 WL
3 1694360, at *7 (N.D. Cal. Apr. 7, 2020) (citing *Castellon v. U.S. Bancorp*, 220 Cal. App. 4th 994,
4 998 (2013)). Citi argues that it owed no duty to Pazmany because Pazmany is not a Citi customer.
5 Dkt. 9 at 2-5.

6 There is “some tension in California court decisions as to whether and when a bank can
7 owe a duty of care to a noncustomer.” *Chang*, 2020 WL 1694360, at *8. A bank generally owes
8 “no duty to nondepositors to investigate or disclose suspicious activities on the part of an account
9 holder”; however, such a duty can be triggered by “extraordinary and specific facts.” *Id.* (quoting
10 *Casey v. U.S. Bank. Nat. Assn.*, 127 Cal. App. 4th 1138, 1149 (2005) and *Software Design &*
11 *Application, Ltd. v. Hoefer & Arnett, Inc.*, 49 Cal. App. 4th 472, 479 (1996)). Each case finding
12 such a duty “involved the bank’s liability for allowing a person to deposit a check, payable to
13 someone else, into a personal account, under circumstances that should have alerted the bank to
14 the possibility of fraud.” *Chang*, 2020 WL 1694360, at *8 (quoting *Chazen v. Centennial Bank*,
15 61 Cal. Appr. 4th 532, 545 (1998) and citing *Sun ‘N Sand, Inc. v. United Cal. Bank*, 21 Cal. 3d
16 671, 695 (1978)). For example, under *Sun ‘N Sand*, a bank’s duty toward a noncustomer was
17 activated “when checks, not insignificant in amount, are drawn payable to the order of a bank and
18 are presented to the payee bank by a third party seeking to negotiate checks for his own benefit.”
19 *Sun ‘N Sand*, 21 Cal. 3d at 695.

20 Thus, the relevant question is whether Pazmany has pleaded narrow, specific facts that
21 could establish that a duty exists and allow the negligence claim to proceed. The Court concludes
22 that the FAC meets this standard. Pazmany alleges that Citi allowed Reed to deposit into her own
23 bank accounts dozens of checks, totaling over \$722,000, that were payable to others and had no
24 endorsements. FAC ¶¶ 27, 32. Although Citi argues that the Court must weigh other policy
25 considerations, such as the customer’s right to privacy and the facilitation of efficient processing
26 of banking transactions (see Dkt. 9 at 3-4), to the extent such balancing must occur in this case it
27 must do so after the facts have been more fully developed, not at the pleading stage.

28 Accordingly, Citi’s motion to dismiss the common law negligence claim is **DENIED**.

1 **C. Money Had and Received**

2 The parties agree that the third cause of action for money had and received derives from
3 Pazmany's negligence claim. Dkt. 9 at 6; Dkt. 13 at 3. Because the Court has denied Citi's
4 motion to dismiss the common law negligence claim, the motion to dismiss the claim for money
5 had and received is also **DENIED**.

6 **D. California Business & Professions Code § 17200**

7 California Business & Professions Code § 17200 defines unfair competition as any
8 "unlawful, unfair or fraudulent business act or practice." Pazmany's Section 17200 claim is based
9 on the "unlawful" and "unfair" prongs; it does not seek to plead a claim based on fraudulent
10 conduct. Dkt. 13 at 14.

11 "Unlawful" practices are those forbidden by law. *Diaz v. Intuit*, No. 5:15-cv-01778-EJD,
12 2017 WL 4386451, at *5 (N.D. Cal. Sep. 29, 2017) (citation omitted). Pazmany states that the
13 FAC "makes clear that the statutory basis for [Pazmany's] unlawful violation of the Unfair
14 Business Practices Act is violation of the UCC." Dkt. 13 at 15. Pazmany does not identify any
15 other possible basis for a Section 17200 claim under the "unlawful" prong. Because, as discussed
16 above, Pazmany has not plead facts sufficient to support a claim that Citi violated the UCC, its
17 attempt to plead a Section 17200 violation under the "unlawful" prong fails.

18 However, Pazmany also bases its Section 17200 claim on the "unfair" prong of the statute.
19 "Unfair" practices are "conduct that threatens an incipient violation of an antitrust law, or violates
20 the policy or spirit of one of those laws because its effects are comparable to or the same as a
21 violation of the law, or otherwise significantly threatens or harms competition." *Id.* (citation
22 omitted). Citi argues that a claim under the "unfair" prong should be dismissed because "Plaintiff
23 does not allege that the harm it has suffered outweighs the utility of the modern banking system
24 that requires banks to quickly and automatically process transactions." Dkt. 9 at 7. Citi does not
25 cite authority requiring such elements to be plead, but in any event Citi acknowledges that "[a]
26 business practice is unfair within the meaning of the [unfair competition law] if it violates
27 established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes
28 injury to consumers which outweighs its benefits." Dkt. 15 at 7 (quoting *McKell v. Wash. Mut.*,

1 *Inc.*, 142 Cal. App. 4th 1457, 1473 (2006)). Here, the FAC alleges the utility of the banking
2 system (FAC ¶ 46); Pazmany's harm (FAC ¶¶ 49, 52); actions of Citi in weighing the costs and
3 benefits of instituting a procedure to assure that any person who deposited a check through an
4 ATM was an authorized depositor (FAC ¶ 48); and harm outweighing the utility (FAC ¶ 49).

5 The Court concludes the facts alleged in the FAC are sufficient to put Citi on notice of
6 which of its practices may be unfair and why. Accordingly, Citi's motion to dismiss the Section
7 17200 claim is **DENIED**.

8 **IV. DISPOSITION**

9 For the foregoing reasons, Citi's motion to dismiss is **GRANTED IN PART WITHOUT**
10 **LEAVE TO AMEND and DENIED IN PART**. Pazmany's first cause of action for
11 negligence/violation of UCC is **DISMISSED WITHOUT LEAVE TO AMEND**. Citi's motion
12 to dismiss the second (common law negligence), third (money had and received), and fourth unfair
13 business practices) is **DENIED**.

14 The Court will hold an Initial Case Management Conference on **August 25, 2020 at 9:30**
15 **a.m.** The parties must file a Joint Case Management Statement by **August 18, 2020**.

16 **SO ORDERED.**

17 Dated: July 30, 2020

18
19 
20 SUSAN VAN KEULEN
21 United States Magistrate Judge

22
23
24
25
26
27
28